Supreme Court, U.S.
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No. 85-176

In The
Supreme Court of the United States
October Term, 1985

TRANSCON LINES, INC.,
Petitioner,

v.

JOS. SCHLITZ BREWING CO.,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

When a shipper makes out a *prima facie* case under the Carmack Amendment by proving that its cargo was in good condition when tendered to the carrier, that the cargo arrived damaged, and the amount of the loss, and the carrier fails to prove the cause of the cargo damage (and therefore its freedom from any contribution to that cause), who prevails?

During the course of this litigation, respondent Jos. Schlitz Brewing Company was acquired by and merged into The Stroh Brewery Company. The Stroh Brewery Company is owned by The Stroh Companies, Inc. There are no subsidiaries that are not wholly owned by The Stroh Companies, Inc.

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INTRODUCTION

The respondent, Jos. Schlitz Brewing Company, requests that the Court deny the petition for a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered on March 20, 1985, because the decision below does not conflict with any decision of this Court or of any federal court of appeals and there are no other special and important reasons for granting the writ. Supreme Court Rule 17.1.

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OPINIONS BELOW

Respondent accepts Petitioner's statement of the opinions below.

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JURISDICTION

The respondent agrees with the statement of jurisdictional grounds set forth in the petition for writ of certiorari.

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STATUTES INVOLVED

Respondent agrees with the Petitioner's identification of the statutes involved.

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COUNTERSTATEMENT OF THE CASE

This is a cargo damage case under the Carmack Amendment of 1906 to the Interstate Commerce Act, § 20 (11) of the Act, recodified at 49 U.S.C. § 11707. In *Missouri & Pacific Railroad v. Elmore & Stahl*, 377 U.S. 134, 138 (1964), the Court held that the Carmack Amendment allocates the burden of proof in cargo damage litigation as follows:

> [U]nder federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability.

At the bench trial in this case, the trial court found that the respondent Jos. Schlitz Brewing Co. ("the Shipper") established delivery in good condition by proof that the cargo in question—empty beer cans—was picked randomly from a Memphis warehouse full of cans, the remainder of which were usable. Arrival in damaged condition was proved when the carrier stipulated during trial that the cans were unusable upon arrival at the shipper's Van Nuys, California brewery and had to be destroyed. The amount of loss—$234,408.32—was also proved by stipulation.

The District Court accordingly concluded that the respondent shipper carried its burden to prove a *prima facie* case under the Carmack Amendment. The trial court identified the disputed issue at trial to be "why the fibers could

not be adequately rinsed out of the cans so as to make them usable." Pet. App. B-8; 571 F. Supp. at 55. The trial court reviewed the theories offered by each side's expert, found neither theory persuasive, and found that "the reason the fiber dust could not be economically removed from the cans has not been shown." Pet. App. B-9; 571 F. Supp. at 56. Nevertheless, the trial court, relying upon common law negligence and commercial law principles, rather than the special burden-of-proof allocation mandated by this Court in *Elmore & Stahl*, concluded that the carrier should not be held liable because "the various factors which possibly contributed to the problem were within the control and exclusive knowledge of the shipper, *cf. Wisconsin Electric Power Company v. Zallea Bros., Inc.*, 606 F.2d 697 (7th Cir. 1979)." Pet. App. B-13; 571 F. Supp. at 58.

On appeal, the shipper argued that the trial court failed to apply the Carmack Amendment to its findings of fact. In a straight-forward application of *Elmore & Stahl* and *Galveston, Harrisburg and San Antonio R. Co. v. Wallace*, 223 U.S. 481 (1911), the Court of Appeals reversed. Pet. App. A-1; 757 F.2d 171.

REASONS FOR DENYING THE WRIT

I. The Decision Of The Court Of Appeals Represents A Routine Application Of This Court's Holding In Missouri & Pacific Railroad v. Elmore & Stahl, Rather Than A Conflict With That Case.

Petitioner has failed to demonstrate the existence of "special and important reasons" justifying review of the Court of Appeals' decision. Supreme Court Rule 17.1. In

an effort to fit this case within one of the narrow categories of cases for certiorari review, the carrier brazenly declares that the decision below conflicts with this Court's seminal case of *Elmore & Stahl* and with cases decided by every other court of appeals, including prior Seventh Circuit cases. In making this remarkable assertion, the carrier does not point to any language in the decision below expressly departing from *Elmore & Stahl*. Indeed, the decision below specifically relied upon *Elmore & Stahl* in reversing the trial court, which had resolved the case in the carrier's favor by resorting improperly to a non-Carmack Amendment case, *Wisconsin Electric Power Co. v. Zallea Bros., Inc.*, 606 F.2d 697 (7th Cir. 1979), *affirming*, 454 F. Supp. 36 (E.D. Wis. 1978). The carrier's real quarrel is with the *Elmore & Stahl* rule itself, which it asks the Court to abandon in its fourth question presented for review.

Furthermore, the petitioner proclaims a split in the circuits by a string citation in footnote 2 of its petition, without any analysis whatsoever to explain the alleged split.[1] Aside from the footnote, no court of appeals decision is discussed or mentioned in the petition.

The carrier's argument under its heading "A" (labeled "herein of 'good condition' v. 'bad condition'") contends that the shipper should have been required as part

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[1]It is noteworthy that the case cited from the Sixth Circuit held in favor of the shipper on remarkably similar facts. *Plough, Inc. v. The Mason and Dixon Lines*, 630 F.2d 468 (6th Cir. 1980)

of its *prima facie* case to prove that at the time it tendered the cans to the carrier, the cans were "1,800-mile rinseable".

This argument has two fatal defects. First, because its premise is that the shipper failed to prove delivery in good condition (i.e. "1,800-mile rinseable"), it challenges the District Court's finding that the shipper proved its *prima facie* case. Pet. App. B-10; 571 F.Supp. at 56. The Court of Appeals agreed that the shipper had met this burden, and noted that this "conclusion is not challenged on appeal." Pet. App. A-5; 757 F.2d at 173; *see also* Pet. App. A-7; 757 F.2d at 174 ("We begin by noting that it is undisputed that Schlitz satisfactorily presented a *prima facie* case.") It is far too late for the carrier to raise this issue.

Second, it reverses the burden of proof as laid down in *Elmore & Stahl*. *Elmore & Stahl* requires a shipper to prove that the cargo was undamaged when delivered; not that the cargo was in a condition capable of withstanding the rigors of the trip. For example, a shipper suing for cargo damage to a fragile vase transported from Memphis to Los Angeles by common carrier need only prove that it was undamaged when tendered, not that it was strong enough to survive the trip (i.e., to use the carrier's phraseology "1,800-mile non-breakable"). Similarly, just as the shipper in *Elmore & Stahl* had no obligation to prove that its melons were "Texas to Illinois non-spoilable" at the time of tender to the carrier, the shipper in the case at bar had no obligation to prove that its beer cans were "1,800-mile rinseable" when tendered to the carrier.

The carrier accuses the Court of Appeals of committing error on a second ground; for finding in the shipper's favor despite what the carrier claims to be a mere "metaphysical" defect in the cargo. This argument is another attack upon the trial court's conclusion that the shipper proved a *prima facie* case. Here, the carrier argues that the shipper never proved that the cargo was really damaged upon arrival in California. However, the carrier stipulated during the trial that the cans were unusable upon delivery and this stipulation was accepted by the trial court (Pet. App. 8; 571 F. Supp. at 55) and noted by the Court of Appeals.[2] (Pet. App. A-5; 757 F.2d at 173) The Court of Appeals also agreed with the District Court that the shipper proved a *prima facie* case and noted that the carrier did not challenge that conclusion on appeal. Pet. App. A-5; 757 F.2d at 173. The carrier should not be permitted at this stage to back off from its stipulation or to challenge the conclusion of the trial court that the shipper proved a *prima facie* case.

The carrier next accuses the Court of Appeals of committing error by finding the carrier liable allegedly on the basis of "unrelated negligence". To call the carrier's negligent acts "unrelated", however, begs the legal question. The carrier is essentially arguing that the shipper had the burden to prove the mechanism that caused the particles to be retained in the cans. This argument stands the Carmack Amendment on its head. Once a *prima facie* case is made,

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[2]As a result of the stipulation, numerous witnesses from the Van Nuys, California brewery who were prepared to travel to Milwaukee, were called off.

> ". . . the law casts upon [the carrier] the burden of the loss which [it] cannot explain or, explaining, bring within the exceptional case in which it is relieved from liability." *Elmore & Stahl,* 377 U.S. at 143-144, *quoting Schnell v. The Vallescura,* 293 U.S. 296, 304 (1934).

Here, the carrier had the burden to explain what mechanism caused the contaminating particles to adhere to the cans. Unless it proved this mechanism, it could not show that the only factors which caused the adherence were a result of one of the common law exceptions to carrier liability. This is what the Court of Appeals was referring to when it stated:

> "Furthermore, it is difficult to accept the conclusion that Transcon had no control over the factors relating to the fiber contamination when the cause of the fiber adhesion was never determined." 757 F.2d at 174.

The carrier suggests only two reasons why the particles might adhere—road grime or diesel smoke—and concedes it would be liable had either reason been the cause of the particle retention. (Pet. p. 8). But there could have been an infinite number of reasons—beyond road grime or diesel smoke—that caused the problem. There might have been chemical, electrical or other physical mechanisms involved. It was the carrier's burden to prove the mechanism and then to show that such mechanism had its sole source in one of the common law exceptions to carrier liability.

The carrier understood and attempted to meet this burden at trial, but failed. The carrier attempted to prove that the mechanism was defective enamel linings in the interior of the cans, a cause that would have constituted either shipper fault or inherent vice, but the trial court

rejected the theory as unpersuasive. Pet. App. B-9; 571 F. Supp. at 56. The carrier offered no other proof to show the cause of the fiber retention. Hence, the carrier's proof hardly exhausted the various possible causes. The only reason why we have a "mysterious" or "metaphysical" cargo damage is because the carrier failed in its burden of proof. Having thus failed, the Court of Appeals reached the correct conclusion of law that the Carmack Amendment imposes liability on the carrier.

Finally, the carrier asks the Court to grant certiorari to reexamine its holding in *Elmore & Stahl,* an argument never presented to the courts below. The carrier has pointed to no difficulties in the judicial administration of litigation under the Carmack Amendment occasioned by the *Elmore & Stahl* rule over the past twenty-one years,[3] nor to any unfairness to the common carrier industry generally. The argument that the burden of proof should be on the shipper to prove freedom from negligence where the damage is caused by an agency as to which it is claimed that the shipper has superior knowledge was rejected in *Elmore & Stahl* in reasoning that remains as forceful today:

> "Since this argument amounts to a suggestion that we now carve out an exception to an unquestioned rule of long standing upon which both shippers and carriers rely, and which is reflected in the freight rates set by the carrier, the petitioner must sustain a heavy burden of persuasion." 377 U.S. at 143.

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[3]Indeed, the premise of the carrier's lead-off argument is that all of the Courts of Appeals are in agreement concerning the rules in cargo damage litigation.

The carrier has fallen far short of meeting its heavy burden of persuasion that the long standing rules of cargo damage litigation should be reexamined.

II. The Court of Appeals Did Not Overturn Any Of The District Court's Findings Of Fact.

The carrier's second major attack on the Court of Appeals' decision charges that it substituted its own findings on the issue of carrier negligence for those of the trial court, in violation of Rule 52, Federal Rules of Civil Procedure, and this Court's recent decision in *Anderson v. City of Bessemer,* 105 S. Ct. 1504 (1985).

However, none of the Court of Appeals' statements are inconsistent with the District Court's findings. The Court of Appeals merely disagreed with the conclusions of law reached by the District Court about the significance, under the Carmack Amendment, of certain undisputed facts. The Court of Appeals correctly decided, on the basis of undisputed facts, that it is impossible to conclude that the evidence of carrier negligence (e.g. unnecessary unloading and reloading of the cargo, the lack of bracing, and the inclusion of unidentified cargo in the reloaded shorter-length trailers) bore no relationship to the fiber dust retention problem when the cause of that problem was never explained.

The trial court's statements with which the Court of Appeals disagreed appear under the heading "Conclusions of Law" in the trial court's opinion (Pet. App. B-10; 571 F. Supp. at 56) and that is precisely what these erroneous statements were, legal conclusions, not findings of fact. Of course, it is entirely within the province of an

appellate court to review and disagree with a District Court's conclusions of law.

RELIEF SOUGHT

WHEREFORE for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: August 27, 1985.

Respectfully submitted,

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